

made the Act, rule 11(5), it shows that every party involved should be issued with Form O. Rule 11(5) reads as follows:

"Where it be necessary to direct the institution of proceedings in court the Collector shall complete the Form O and deliver the same to the parties referred to therein."

Rule 11(6) speaks of "where the parties omit to institute the proceedings in court . . .", again indicating that Form O should be issued to every party. Thus, if the Form is issued only to one party then the others would be deprived of the right to do so under the Act.

I am of the opinion that the matter can be conveniently dealt with by the Collector upon determining that there is a collateral dispute by appointing under section 14(7) one of the beneficiaries who disputes any claim to be the administrator limited for the purpose of suing or being sued. Such administrator will then represent the estate and thus will become one party. The administrator should also be issued with Form O. All other claimants to the estate or to any of the assets should be similarly issued with Form O each. The claimants then may sue the administrator for specific performance or for such other order and the administrator may sue the claimants for a declaration that any agreement made between the deceased with the claimant to be void or for any other order. If all of them omit to institute such proceedings then none of them can be heard to say that they have been deprived of the right to have the case adjudicated in a court. The Collector will then proceed to hear the case under section 14(4).

As far as possible, the Collector should appoint one of the beneficiaries who objects to the claim to be the administrator, so as to enable the claimant to claim against such administrator, thereby following the principle that it is the deceased, through his administrator, who is being sued for an obligation incurred during his life time. However, the administrator should be given his right to sue, should he consider that the court is the proper venue for redress instead of the Collector in the event that the claimant fails to institute the proceedings in court.

It also sometimes occurs that when a beneficiary is granted with letters of administration, he will, armed with such letters, try to take possession of the land. This can be remedied by the Collector endorsing on the letters of administration which is in Form F the limitation of use of those letters, that is for the purpose of suing or being sued and for no other purpose. If it is not intended that the administrator is to look after the property or to collect any debts (words to these effects are printed in Form F) then these words should be deleted from the Form.

In the instant case, in view of the fact that Form O was not issued to the appellant, I set aside the order made by the Collector. I direct that the Collector grant letters of administration to the appellant again as he had done before and issue Form O to both the parties. There is no necessity of issuing the form to the other purchaser Mohamad Nor bin Omar since there is no dispute as to his claim.

A This is a case where I think there should not be any costs awarded. I therefore order that there shall be no order as to costs and the deposit paid herein by the appellant in the sum of \$150 towards costs be refunded to him.

Order accordingly.

B Solicitors: *Datuk Wan Mustapha & Co.; Yusof, Idris, Hazzan & Fadzil.*

PUBLIC PROSECUTOR v. ONG KHOON SENG

C [A.Cr.J. (Seah J.) October 23 & November 7, 1981]
[Kuching — Criminal Appeal No. KG 3 of 1981]

Criminal Law and Procedure — Summary trial — Whether prosecution has made out a prima facie case — Submission of no case to meet — Practice to allow submission and reply.

D *Customs — Whether trial court has jurisdiction to discharge and acquit accused on payment of deficient customs duty — Customs Act, 1967, ss. 17 & 135(1)(g).*

In this case the respondent was charged with the offence of being knowingly concerned in the fraudulent evasion of customs duty. At the close of the prosecution case while defence counsel was in the process of submitting no case to answer the learned Magistrate stopped him. He noted that there was no provision in the law to say that the court must hear the defence submission at the close of the prosecution case. He then proceeded without hearing the prosecution to rule that the prosecution had failed to make out a *prima facie* case and he acquitted and discharged the respondent. The learned Magistrate then ordered the respondent to pay the undercollection of duty under section 17 of the Customs Act, 1967 and upon payment the car in question to be returned to him. The Public Prosecutor appealed.

F **Held:** (1) in this case on the oral and documentary evidence produced the prosecution had made out a *prima facie* case and the respondent should be called to enter on his defence;

(2) the trial court has no jurisdiction to discharge and acquit the accused on payment of the deficient customs duty. The power under section 135(1)(g) of the Customs Act, 1967, may be exercised by the Customs Department, not by the court;

G (3) although there is no express provision in the Criminal Procedure Code permitting a defence counsel to make a submission of no case to answer or for the trial court to hear such a submission at the close of the prosecution case, the practice of the courts has always been to allow defence counsel to make such a submission if he so desires and for the trial court to permit the Deputy Public Prosecutor to reply to such a submission.

H *Cases referred to:-*

- (1) *Mahindar Singh v. Public Prosecutor* [1941] M.L.J. 230.
- (2) *R. v. Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256.

CRIMINAL APPEAL.

I *Abang Abdul Rahaman bin Datuk Haji Abdul Rahim* (Deputy Public Prosecutor) standing in for *Nik Hashim bin Nik Abdul Rahman* (Deputy Public Prosecutor) for the appellant.

Benedict Lim standing in for *David Tiong* for the respondent.

Seah J.: In this case, the respondent, Ong Khoo Seng, was charged as follows:

"That you, on 27th day of May 1978 at Customs Office, Kuching Port Authority, Tanah Puteh, Kuching, First Division, Sarawak were knowingly concerned in a fraudulent evasion of customs duty, to wit, \$13,339.78 leviable by law, being the difference of customs duty assessed by customs amounting to \$22,959.78 as against the customs duty calculated from Import Declaration No. 112242 dated 27th May, 1978 amounting to \$9,620.00 on one unit of new motor vehicle (Porsche Coupe 924) Chassis No. 9246106573 and Engine No. YJ 001144 imported into Sarawak from Singapore and you thereby committed an offence under section 135(1)(g) and punishable under section 135(1)(i) of the Customs Act 1967."

At the close of the prosecution case while defence counsel was in the process of submitting no case to answer, the trial Magistrate stopped him and the record reads:

"(Mr. Tiong agreed that there was no provision in the law to say the court must hear the defence submission at the close of the pro. case)."

And without hearing the prosecution the trial Magistrate proceeded to rule that the prosecution have failed to make out a *prima facie* case, acquitted and discharged the respondent. The trial Magistrate also ordered the respondent to pay the under collection under section 17, i.e. \$13,399.78 and upon payment the Porsche car No. KH3322 shall be returned to him. The Public Prosecutor was dissatisfied with this ruling and has appealed to the High Court on various grounds.

Briefly, the facts adduced by the prosecution before the trial court are these:

- (a) On May 27, 1978 the respondent produced a signed Import Declaration (Ex. P13) indicating that he had imported into Sarawak from Singapore one unit of new Porsche 924 motor-car and the value was given to be \$14,800. As this was the first time that a Porsche 924 Coupe was imported into Sarawak the Customs did not know its proper value. However, the Customs allowed the said Porsche to be released subject to (a) the respondent producing the invoice on May 29, 1978 and (b) if there should be an uplift of value, the respondent agreeing to pay the difference.
- (b) On May 29, 1978 the respondent did not produce the invoice but a letter from Ngo Hock Auto Spares Co. (Pte) Ltd., Singapore, was tendered purporting to show the CIF value of the Porsche to be \$14,800 (Ex. P18).
- (c) The Customs were not satisfied with this and mounted an investigation culminating in the discovery of certain documents which showed the FOB price of the said Porsche 924 Coupe to be \$530,439.31 (Ex. P23) and this invoice from Ngo Hock Auto Spares Co. (Pte) Ltd., Singapore, was dated May 16, 1978. The Customs also found 5 receipts from Ngo Hock Auto Spares Co. (Pte) Ltd., Singapore amounting to a total of \$530,439.31 made out in the name of the respondent (Ex. P24, 24(a) and 24(b)). That this payment of the sum of \$530,439.31 was in fact made was corroborated by remittances sent to Singapore by a local bank (Ex. P27 and P27(a), P28 and P28(a)) dated January 31, 1978 and April 19, 1978 respectively.
- (d) The prosecution contended that all these relevant documents were in the custody or possession of

the respondent when he submitted the Import Declaration to the Customs Department on May 27, 1978 and that he also had knowledge of these said documents, inasmuch as on February 1, 1978 he had entered into an agreement in writing to sell the said Porsche 924 Coupe to Goh Leng Chua for the sum of \$52,000 and full payment of the purchase price had been made (see Ex. P8, P9, P9(a), P9(b) and P9(c)).

- (e) As regards the state of mind of the respondent at the material times, the prosecution relied on 2 documents which tended to prove that the respondent had hatched a scheme to defraud the Customs, viz. Import Licence (Ex. P14) and Insurance policy (Ex. P10). It was pointed out that a special condition was imposed in Ex. P14 which stipulated that the said Porsche 924 Coupe could not be sold or transferred within a period of 2 years and yet the respondent had disposed of the said vehicle to Goh Leng Chua on February 1, 1978. Secondly, the said Porsche car left Singapore for Kuching on or about May 23, 1978 and the respondent took out a policy of insurance from South East Asia Insurance Berhad on May 26, 1978 in Kuching to insure the said vehicle for the sum of \$18,000. It is the contention of the prosecution that this was a feeble attempt by the respondent to try to pass the value of the said Porsche car at \$14,800.

Senior Federal Counsel has submitted that on these facts the prosecution have made out a *prima facie* case against the respondent as charged, if unrebutted, would warrant his conviction. After reading the oral as well as the documentary evidence produced before the lower court, I am inclined to agree with this submission. For these reasons I quash the order of the trial Magistrate discharging and acquitting the respondent and direct him to call the respondent to enter upon his defence.

There is one other matter I like to mention. I agree with the contention of the Senior Federal Counsel that the provisions of section 17 of the Customs Act 1967 are administrative in nature and that when an accused person is charged under section 135(1)(g) thereof the trial court has no jurisdiction to discharge and acquit the accused on payment of the deficient customs duty. In short, it is the Customs Department and not the trial court which should exercise this power.

Although there is no express provision in the Criminal Procedure Code permitting a defence counsel to make a submission of no case to answer or for the trial court to hear such a submission at the close of the prosecution case, the practice of the courts in this country has always been to allow defence counsel to make such a submission if he so desires and for the trial court to permit the Deputy Public Prosecutor to reply to such a submission. It should be remembered that both defence counsel and the Deputy Public Prosecutor are officers of the court and they are there to assist the court. In this connection, I would like to refer to the case of *Mahindar Singh v. Public Prosecutor*⁽¹⁾ where Terrell Ag. C.J. said:

"...The eighth ground of appeal alleges that the accused's counsel was never given an opportunity of addressing the court at the close of the case. This is admitted by the learned Deputy Public Prosecutor and constitutes a serious irregularity. In view of this there is no necessity to enter into the merits of the conviction. The appeal will be allowed, the conviction set aside and a new trial ordered."

I myself had occasion to deal with this matter in Kuching Criminal Appeal No. K.7/79 where I said: "In this connection, I would like to quote a well-known dictum of Lord Hewart in *R. v. Sussex Justices, Ex parte McCarthy*⁽²⁾ that 'it is of fundamental importance that justice should both be done and be manifestly seem to be done'."

The appeal is allowed.

Appeal allowed.

Solicitors: *David Tiong & Michael Tiong.*

SIM BOON CHAI v. PUBLIC PROSECUTOR

[A.Cr.J. (Seah J.) October 20, 1981 & November 7, 1981]

[Kuching — Criminal Appeal No. KG 7 of 1981]

Criminal Law and Procedure — Sentence — No record of antecedents and character of accused — Penalty under regulations — Interpretation Act, 1967, s. 27 — Control of Supplies Regulations, 1974, Reg. 13(1) — Control of Supplies Act, 1961 (Act 122), s. 22.

In this case the appellant had pleaded guilty to the offence of failing to maintain a stock book of a scheduled article, an offence under regulation 13(1) of the Control of Supplies Regulations, 1974. The learned Magistrate noted —

"The accused is convicted on his own plea. Accordingly I fine the accused a sum of \$3,000 in default of 3 months imprisonment."

The appellant appealed against the sentence.

Held: (1) although time has not been expressly specified in Regulation 13(1) of the Control of Supplies Regulations, 1974, this should be read subject to section 37 of the Interpretation Act, 1967 and entries in the stock book are to be made from time to time as occasions require them. As the appellant had totally failed to record the purchases of sugar in the stock book during the months of October and November 1980 he was plainly guilty of contravening Regulation 13(1) of the Regulations;

(2) although the Regulations are silent as to penalties, the penalties are provided in section 22 of the Control of Supplies Act, 1961 and having regard to the express provision of section 22 of the Act, section 27 of the Interpretation Act, 1967 is irrelevant in considering the sentence to be passed on the appellant by the trial Magistrate;

(3) the trial Magistrate in this case did not record any evidence of the antecedents and character of the accused before proceeding to sentence. The fine of \$3,000 was manifestly wrong in the sense of being unsuitable to the proved facts and circumstances of the case and should be set aside and a fine of \$2,000 or in default 2 months' imprisonment be substituted.

Cases referred to:-

(1) *Abu Bakar bin Alif v. R.* [1953] M.L.J. 19.

(2) *R. v. Ball* 35 C.A.R. 164.

(3) *Public Prosecutor v. Fam Kim Hock* [1957] M.L.J. 20.

CRIMINAL APPEAL.

Chan Khoon Ted for the appellant.

Nik Hashim bin Nik Abdul Rahman, Deputy Public Prosecutor (*Abang Abdul Rahaman bin Datuk Haji Abdul Rahim*, Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Seah J.: On December 12, 1980 at about 9.45 a.m., a party of Enforcement Officers from the Ministry of Trade and Industry, Kuching, Sarawak, made a surprise check on the appellant, who has been issued with a wholesaler licence by the Controller of Supplies, Kuala Lumpur to deal in 3 scheduled articles such as flour, sugar and cooking oil, and who carries on business under the trade name of Tai Seng Company at No. 95, Ang Cheng Ho Road, Kuching, Sarawak. The officers found that the appellant had failed to maintain a stock book of scheduled article where there should be entered particulars and every purchase of the said scheduled article showing the date, quantity, price, name and address of the seller in respect of these purchases. The appellant was accordingly charged under Regulation 13(1) of the Control of Supplies Regulations, 1974. He pleaded guilty to the charge and was convicted and fined \$3,000 or in default 3 months' imprisonment.

The appellant, Sim Boon Chai, is dissatisfied with the fine and this appeal is against sentence only.

Before dealing with the appeal I would like to set out the relevant facts. It is common ground that when the Enforcement Officers from the Ministry of Trade and Industry visited the appellant's premises, they were handed a stock book relating to sugar which appears to have been made up to September 10, 1980. At the same time, the Enforcement Officers discovered that the appellant had made 6 purchases of sugar from Lian Hua Seng Co., Sdn. Bhd., particulars of which are as follows:

(i) Invoice 64286	—	3.10.80	—	\$ 6,720.00
(ii) Invoice 64465	—	11.10.80	—	\$ 672.00
(iii) Invoice 64662	—	25.10.80	—	\$ 3,375.00
(iv) Invoice 64851	—	14.11.80	—	\$ 6,750.00
(v) Invoice 64886	—	15.11.80	—	\$ 6,750.00
(vi) Invoice 64937	—	18.11.80	—	\$13,500.00 — \$37,767.00

It appears that the appellant had made 3 payments totalling \$50,967.00 on these dates and in respect of all of the above-named invoices, viz:

(a) Receipt 24992	—	14.11.80	—	\$20,592	(Invoices 64465, 64286 and 63874)
(b) Receipt 25037	—	20.11.80	—	\$ 3,375	(Invoice 64662)
(c) Receipt 25154	—	9.12.80	—	\$27,000	(Invoices 64851, 64886 and 64937).

It is plain that these transactions spread over a period of slightly over 2 months from October 3, 1980 to December 9, 1980, and it is not disputed that the appellant had not entered these purchases in his stock book (Ex. P2).

Now, Regulation 13(1) reads:

"A wholesaler shall maintain a stock book of every scheduled article to which his licence relates in which there shall be entered particulars of every purchase or sale by him of the scheduled article showing the date, quantity, price, and the name and address of the seller or purchaser, as the case may be, in respect of such purchase or sale."

Counsel for the appellant has rightly pointed out that unlike Regulation 13(3), a wholesaler need not have to maintain a *daily* record and he argued that since no time has been stated when the entries are to be made, it follows that the entries need not have to be made up-to-date. It seems to me that counsel for the appellant has overlooked section 37 of the Inter-